No. 14,915

IN THE

United States Court of Appeals

For the Ninth Circuit

FLORENCE ALICE PAQUET,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLEE.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,
CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,
LOYD H. BURKE,
United States Attorney,
Northern District of California,
Attorneys for Appellee.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellee agrees with the jurisdictional state-ıent of appellant but adds that appellant was ad-ıdged guilty and sentenced (R. pp. 8-10) on August 3, 1955, and additional jurisdictional statute is found : 28 U.S.C., Section 1294.

STATEMENT OF THE CASE.

The appellee adds to statement of the case by ıe appellant in the following respects.

The exhibits complained of were introduced also in connection with all counts of the indictment. That they were introduced over objection (Ex. 1, R. 30; Ex. 2, R. 38; Ex. 3, R. 34; Ex. 4, R. 109; Ex. 5, R. 96; Ex. 6, R. 108).

The appellee states that all of the extrajudicial admissions elicited from George L. Elms (R. pp. 82-95) were as a result of responsive answers of Mr. Elms to appellant's counsel on cross-examination. These were not objected to by appellant and were not therefore raised by motion for acquittal. (R. p. 147). The defense put them in evidence.

STATUTES INVOLVED.

18 U.S.C. Section 1542.

False statement in application and use of passport.

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. Section 911.

Citizen of the United States.

Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Section 290(d), Immigration and Nationality Act, ct of June 27, 1952, Sec. 290(d), 66 Stat. 234; 8 .S.C. §1360(d).

Establishment of central file; information from other departments and agencies.

(d) A written certification signed by the Attorney General or by any officer of the Service designated by the Attorney General to make such certification, that after diligent search no record or entry of a specified nature is found to exist in the records of the Service, shall be admissible as evidence in any proceeding as evidence that the records of the Service contain no such record or entry, and shall have the same effect as the testimony of a witness given in open court. June 27, 1952, c. 477, Title II, ch. 9, §290, 66 Stat. 234; 1953 Reorg. Plan No. 1, §§5, 8 eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat.

Section 215, Immigration and Nationality Act, Act June 27, 1952, Sec. 215, 66 Stat. 190, 8 U.S.C. §1185.

Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens,

whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful.

R.S. 161; 5 U.S.C. Section 22.

Departmental regulations. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. (R.S. §161.)

28 U.S.C. Section 1733(b).

Government records and papers; copies

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.

Proclamation No. 3004, January 17, 1953;
67 Stat. C31.

CONTROL OF PERSONS LEAVING OR ENTERING THE UNITED STATES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require

that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The department and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * * * *

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 17th day of January in the year of our Lord nineteen hundred and fifty-three and of the Independence of the United States of America the one hundred and seventy-seventh.

(SEAL)

HARRY S. TRUMAN

By the President:
DEAN ACHESON
Secretary of State

REGULATIONS.

8 C.F.R. Section 2.2.

Certification of nonexistence of record. The chief of the Records Administration Branch of the Central Office may certify the nonexistence in the records of the Service of an official file, document, or record pertaining to a specified person or subject.

22 C.F.R. Section 1.1.

Officers authorized to sign and issue certificates of authentication. An officer or employee of the Department of State designated as Authentication Officer or as an Acting Authentication Officer of said Department may, and he is hereby authorized to, sign and issue certificates of authentication under the seal of the Department of State for and in the name of the Secretary of State

or Acting Secretary of State. The form of authentication shall be as follows:

In testimony whereof, ..., Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the City of Washington, in the District of Columbia, This ..... day of ....., 19.....

.....
Secretary of State

By.....
Authentication Officer,
Department of State

(R.S. 161; 5 U.S.C. 22) [Dept. Reg. 13, 10 F.R. 13396, redesignated by Dept. Reg. 108.77 13 F.R. 6349]

22 C.F.R. Section 53.1.

Limitations upon travel. No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his journey, or in the foreign country in which he was last present if such country is

not the one from which he started his journey, or unless he comes within one of the exceptions prescribed in §§ 53.2 and 53.3. No fee shall be collected by a diplomatic or consular officer of the United States for or in connection with such verification.

22 C.F.R. Section 53.2.

Exceptions to regulations in § 53.1. No valid passport shall be required of a citizen of the United States or a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, Puerto Rico, and the Virgin Islands, or between any such places; or

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto; Provided, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States via any country or territory in North, Central or South America or in any island adjacent thereto, for which a valid passport is required under §§ 53.1-53.9; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman; or

(d) When departing from or entering into the United States as an officer or member of the enlisted personnel of the United States Army or the United States Navy on a vessel operated by the United States Army or the United States Navy; or

(e) When traveling as a member of the armed forces of the United States or a civil employee of the War or Navy Departments between the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, and any foreign country or territory for which a valid passport is required under the regulations in this part: Provided, That he is in possession of a document of identification issued for such purposes by the War or Navy Departments; or

(f) When specifically authorized by the Secretary of State, through the appropriate official channels, to depart from or enter into the continental Untied States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States.

[Dept. Order 1003 (DR 299-x), 6 F.R. 6069, as amended by Dept. Reg. 11, 10 F.R. 11046 and at 13 F.R. 7637]

22 C.F.R. Section 53.9.

Definition of the term "continental United States". The term "continental United States", as used in this part, includes the territory of the several States of the United States and Alaska.

SUMMARY OF ARGUMENT.

The admission of all exhibits was proper. Appellant's requested instruction No. 18 is erroneous as a matter of law. The admission in evidence of testimony as to oral admissions was fully corroborated.

ıe admission of the written statement of the appel-
ıt was proper in view of the fact that the *corpus*
licti had been established and the confession cor-
brated.

ARGUMENT.

ADMISSION OF DOCUMENTARY EVIDENCE.

hibit 1—The Certificate of Non-Existence of Citizenship Record.

This certificate is as set out below.

56347/918

July 8, 1955

CERTIFICATE OF NON-EXISTENCE OF CITIZENSHIP RECORD

I, Hildred L. Hardin, hereby certify to the following:

1. That I am Chief, Records Administration and Information Branch, Administrative Division, of the Central Office, Immigration and Naturalization Service, United States Department of Justice, and by virtue of such position and authority contained in 8 C.F.R. 2.2, and Section 290(d) of the Immigration and Nationality Act, that I am custodian of all records of the Central Office of the United States Immigration and Naturalization Service, including records relating to Citizenship and Naturalization created or maintained pursuant to 8 U.S.C. 1450, 1452, 1454, and 1501, and required to be filed with the Commissioner of Immigration and Naturalization pursuant to regulations of the Attorney General. The Central Office of the United States Immigration and Naturalization Service maintains records of all

persons naturalized in the United States during the period from September 1906 to date.

I hereby certify that no record whatsoever evidencing United States citizenship of a person by the name of Florence Alice Paquet, alias Betty Mehan, alias Alice Smith, alias Mrs. Ted Lane, exists in the Central Office of the United States Immigration and Naturalization Service.

H. L. Hardin, Chief
Records Administration and
Information Branch.

As can readily be seen from the certificate itself, it is based primarily upon Section 290(d), Immigration and Nationality Act and Section 2.2, 8 C.F.R. Section 290(d) provides:

> A written certification signed by the Attorney General or *by any officer of the Service designated by the Attorney General* to make such certification, that after diligent search no record or entry of a specified nature is found to exist in the records of the Service, shall be admissible as evidence in any proceeding as evidence that the records of the Service contain no such record or entry, and shall have the same effect as the testimony of a witness given in open court. (Emphasis added.)

Section 2.2, 8 C.F.R. provides:

> The Chief of the Records Administration Branch of the Central Office may certify the nonexistence in the records of the Service of an official file, document, or record pertaining to a specified person or subject.

The two sections above read together show the au-
ority of the named persons making the certification
d the authority for admitting a document of this
pe in evidence. The one remaining question to be
solved then is the wording of the certification.

The certificate reads in part as follows:

> That I am Chief, Records Administration and Information Branch, Administrative Division, of the Central Office. * * * and by virtue of such position and authority contained in 8 C.F.R. 2.2, and Section 290(d) of the Immigration and Nationality Act * * *. I hereby certify that no record whatsoever evidencing United States Citizenship of a person by the name of Florence Alice Paquet * * *, exists in the Central Office of the United States Immigration and Naturalization Service.

It is the contention of the appellee that this cer-
icate meets the requirements of the statute for the
llowing reasons.

It is clear that the authority of Hildred L. Hardin,
ief, Records and Administration Branch, Central
fice, to make the certification is set out in Section
60(d), 8 U.S.C. and in Section 2.2, 8 C.F.R.

Reference was made to the statutes and regulations
ving the certifier authority. It is noted that the
atutory reference uses the words "after a diligent
arch." It is contended that by reference the full
port of the statutory requirements are complied
th. That is "after a diligent search." Here it is

clear that Hildred Hardin had this section (Section 1360(d)) in mind when the certification was made.

Reference was also made to the regulations promulgated by the Attorney General (8 C.F.R. 2.2) and it is here that the administrative interpretation of the statute comes into play. As set forth above the certification follows the regulations as closely as possible. It is certainly a fair interpretation that both the statute and the regulations were complied with in the execution of this certificate.

Assuming for the purpose of this brief that the statute was not complied with. Where is the prejudicial error? Could appellant have been convicted without this certificate? Error must be regarded as harmless if upon examination of entire record substantial prejudice does not appear. *Sang Soon Sur v. U. S.,* 167 F.(2d) 431 (9th Cir. 1948); *Ah Fook Chang v. U. S.,* 91 F.(2d) 805 (9th Cir. 1937). An error which could not affect result may be disregarded. *Brown v. Allen,* 344 U.S. 443. See also *Wolcher v. U. S.,* 200 F.(2d) 493 (9th Cir. 1952). The appellee's case consisted of the passport application (Ex. 2, Ex. 3); the United States Passport (Ex. 4); the Canadian Passport (Ex. 5); and the appellant's confession (Ex. 6). The evidence adduced by the government therefore consisted of the following. A Canadian Passport with appellant's name and picture thereon, which was voluntarily turned over to Mr. Elms the day following appellant's civil arrest in deportation, March 31, 1955 (R. pp. 79-81), which contained and exemplified: (1) Canadian citizenship; (2) Birth at Inverness, Canada.

e application for the passport (Ex. 2, 3) showed th at Barre, Vermont, its filing date and a picture ached. About the picture Mr. Cummins testified t the photograph was of the appellant (R. pp. 24,). The United States Passport was linked to the pellant and identified by Miss Prendergast (R. pp. 53, 54, 60).

Mr. Keane's testimony laid the ground work by ntifying the appellant by identifying the passport d by stating the circumstance of the March 30th nsaction (R. pp. 64-70).

With this evidence, there was shown the application a United States Passport by appellant, the issue of a United States Passport to appellant, a representation as a United States citizen upon the passport plication by appellant, the passing through immiation inspection by presenting a United States Passrt by appellant and a representation of United ates citizenship by appellant to the Immigrant Inector. Together with the above is added the Cadian Passport as evidence of alienage of the apllant and of the time, and place of her birth. Therere, it is contended that there was shown more than e bare *corpus delicti,* that is proof that a crime has en committed and that someone committed it. (*U. S. Echeles,* 222 F.(2d) 144, 7th Cir. 1955). There is ded the final element also that the appellant comtted the offense. There is much more here than the re *corpus delicti* without Exhibit 1. Therefore, there as no prejudicial error and the admission of the apllant's confession was not error but proper.

Exhibit 3—Duplicate Original of Passport Application.

Exhibit 3 in evidence was presented by Miss Prendergast, the Passport Administrator, from her files. It was identified by Thomas Cummins and by Miss Prendergast. This document was a duplicate original (R. p. 27). The appellant was linked with the application (R. pp. 24, 26). It appears further that there is no substantial argument—this is material to the offenses charged in the indictment. It was properly admitted in evidence.

Exhibit 2—Photographic Copy of Application for Passport.

Exhibit 2 in evidence is a photographic copy of the duplicate original of Exhibit 3. It carries the authentication exactly as that found in 22 C.F.R. 1.1 issued under authority (R.S. 161; 5 U.S.C. 22). This authenticated photographic copy from the files of the Department of State is admissible equally with the original thereof (28 U.S.C. § 1733(b)). This exhibit was identified by Mr. Cummins (R. pp. 22-24) and by Miss Prendergast (R. p. 53) and linked with the appellant (R. p. 24). There is no worthwhile argument as to the materiality of this exhibit. Consequently, this exhibit also was properly admitted.

Exhibit 4—United States Passport.

The United States Passport was given by the appellant to George L. Elms on request. (R. p. 94). It was identified by Miss Prendergast (R. pp. 59, 60). There is no evidence anywhere in the record that the

ited States Passport was secured by anything but
ful means. Further, even if there might have been
unlawful search and seizure there was no motion
uppress made prior to trial. The complete record
proceedings in the District Court was designated
appeal. (R. p. 14). The motion made during the
l was not timely. Rule 41(e), Federal Rules of
minal Procedure; *U. S. v. Di Re,* 2nd Cir. 1947,
F.(2d) 818, aff. 332 U.S. 581. There was no sur-
se involved. Rule 41(e), Federal Rules of Criminal
cedure; *U. S. v. Di Re, supra.* Where appellant
not move before trial to suppress evidence or ex-
n his failure to do so, no complaint can be made
appeal of admission of such evidence. *Cromer v.*
S. (D.C. Cir. 1944), 142 F.(2d) 697, cert. denied
U.S. 760. Viewing the record concerning this
ibit there was no abuse of discretion on the part
he District Court.

'o set the record straight James Keane is a United
tes Immigrant Inspector and has power to ques-
n "any person believed to be an alien as to his
nt to be or to remain in the United States" (8
3.C. § 1357(a)) and to search without a warrant
person and personal effects of any person seeking
nission to the United States. (8 U.S.C. § 1357(c)).
gardless of what powers Mr. Keane possessed he
ified that appellant presented him with the United
tes Passport (R. pp. 65-66), which he later re-
ned to appellant (R. p. 68). Nor was appellant
ecosted" by Mr. Keane (Appellant's Brief p. 7).
pellant was passing through Immigration inspec-

tion and was required to present credentials to Mr. Keane who was the Immigrant Inspector on duty (R. p. 65).

Further to clarify the record, 288-A Wai Nani Way is not the home of the appellant, but is the residence of a friend (R. p. 113). (See Appellant's Brief pp. 7-8). George L. Elms was given the United States Passport (Ex. 4) at this address and on the following day the appellant gave him the Canadian Passport (R. p. 80). (Compare Appellant's Brief p. 8).

Despite a lengthy cross-examination by appellant's counsel there was no evidence whatsoever that the passport was procured in anything but a lawful manner. (R. pp. 82-95). This exhibit was properly admitted.

Exhibit 5—Canadian Passport.

The only evidence concerning the Canadian Passport is that the appellant presented it to Mr. Elms (R. p. 80), nor was there any cross-examination concerning the Canadian Passport. Mr. Elms identified it and connected it with the appellant. (R. pp. 79-81). The Court will note that this passport was turned over to Mr. Elms on March 31, 1955, the day after the transaction at 288-A Wai Nani Way. The only evidence shows that it was voluntarily turned over to Elms. There appears to be no substantial question involved in the admission or relevancy of this exhibit. The Canadian Passport was properly admitted.

ıibit 6—Written, Signed, Sworn Statement of the Appellant.

Reference is made to the argument *supra* concern-
Exhibit 1. The evidence sustaining the fact that a
rpus delicti had been established is outlined there.
e addition could be made. The testimony of George
ns concerning the voluntariness of the confession.
. pp. 105-106). The admission of the confession in
dence depends upon the admission of other evi-
ıce amounting to proof of the *corpus delicti*. This
urt has held that the *corpus delicti* need not be
ɔved beyond a reasonable doubt (*D'Aquino v. U. S.,*
2 F.(2d) 328, cert. denied 343 U.S. 935, rehearing de-
d 343 U.S. 958), or the offense by a preponderance
the evidence (*Davena v. U. S.,* 198 F.(2d) 230, cert.
ıied 344 U.S. 878; *Smith v. U. S.,* 348 U.S. 147, 156.
e also *Opper v. U. S.,* 348 U.S. 84, 93). It is the
ıtention of the appellee that the offense itself with-
t the confession was proved at least by a pre-
nderance of the evidence and possibly beyond a
ısonable doubt. Certainly even measured by the
ɔst stringent standards of corroboration, this con-
ɔsion is admissible.

The appellee contends that all six exhibits were
ɔperly admitted and no error was committed by the
strict Court.

ADMISSION AND CONFESSION OF APPELLANT.

The admissibility of the written statement of the appellant (Ex. 6) has been discussed *supra* and disposed of there.

The appellee is somewhat perplexed by the objection of the appellant to the oral admissions of the appellant elicited from George L. Elms on cross-examination by counsel for appellant. (R. pp. 82-95). These admissions found their way into evidence by responsive answers to questions propounded by appellant. The appellant is objecting to evidence which was adduced through her own efforts. But be that as it may, the admissions if appellee is to be made responsible for them certainly meet the corroboration tests of the *Smith* and *Opper* cases, *supra.*

As to the testimony of James Keane there are two statements which he testified that appellant made. He asked appellant if the United States Passport was hers and received an affirmative answer (R. p. 67). He asked her also if she were born in Barre, Vermont, and her answer was yes (R. p. 67). The first statement is an admission and certainly is a well corroborated admission and is admissible (*Opper v. U. S., supra; Smith v. U. S., supra*). The second statement was put in evidence not to show the truth of the statement but to show that the statement had been made. It is admissible. *Murray v. U. S.,* 10 F.(2d) 409, cert. denied 271 U.S. 673; *Hicks v. U. S.,* 173 F.(2d) 570, cert. denied 337 U.S. 945; *Braswell v. U. S.,* 200 F.(2d) 597.

REFUSAL OF DEFENDANT'S REQUESTED INSTRUCTION NO. 18.

The instruction in issue is found at R. p. 7 and appellant's Brief page 12. In connection with this instruction appellant makes the following statement, "All counts of the indictment grow out of a single transaction, namely: procurement of a passport by defendant, for travel between Hawaii and Guam. Admittedly such a passport is wholly unnecessary." (Appellant's Brief p. 12).

Appellee's answer is that this statement is erroneous.

Supporting our contention that a passport is required for travel between Hawaii and Guam are the following statute, Presidential Proclamation and Regulations: Act of June 27, 1952, Sec. 215, 66 Stat. 163, 0, 8 U.S.C. 1185; Presidential Proclamation No. 04, 67 Stat. C31; 22 C.F.R. §§ 53.1-53.9.

Under Section 215, Immigration and Nationality t, the President is empowered to make restrictions d prohibitions in addition to those provided in that tion during time of National Emergency proclaimed the President.

President Truman did this on January 17, 1953 in roclamation No. 3004. In this proclamation he inrporated by reference the provisions of Title 22, F.R. §§ 53.1-53.9. These prohibit the entry or derture from any Territory or Insular Possession thout a passport. (22 C.F.R. 53.1). Excepted from is rule is travel to and from Hawaii, Puerto Rico, d the Virgin Islands and countries in North, Cen-

tral, and South America. (22 C.F.R. 53.2). Continental United States is defined as the Several States and Alaska. (22 C.F.R. 53.9). It is to be noted that provisions exempting travel to and from Guam are conspicuous by their absence. It is obvious then that a passport is needed for travel between Hawaii and Guam during a period of National Emergency proclaimed by the President.

Turning to appellant's requested instruction No. 18, it is obvious that during a time of National Emergency proclaimed by the President that this instruction is erroneous. Further, even when there is no National Emergency, the instruction would have no application to Count I and Count III. The false procuring of the passport is the essence of the offense and the purpose in securing it or its proposed use is immaterial. In that sense, it would be misleading to the jury.

MOTION FOR ACQUITTAL.

In view of the argument presented above, the denial of the motion for acquittal was proper and no error was committed.

CONCLUSION.

It is respectfully submitted that all exhibits were properly admitted, that the motion to strike the exhibits was properly denied, and that the denial of the motion for acquittal was sound.

ne judgment of the District Court should be af-
ed.

ated, Honolulu, T. H.,
April 20, 1956.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,
CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,
LLOYD H. BURKE,
United States Attorney,
Northern District of California,
Attorneys for Appellee.